Shinning Crest Sdn Bhd (appointed receiver and manager) & Ors v Malaysia Building Society Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-19–01 OF 2017
MOHD NAZLAN J
12 JANUARY 2018

Civil Procedure — Judgment — Consent judgment — Breach of consent judgment — Application by loan defaulter and guarantors to set aside consent judgment — Whether application ought to be allowed — Whether application afterthought — Whether application ought to be struck out

The defendant granted a term loan facility of RM27.5m to the first plaintiff, a property developer. The second to fifth plaintiffs were the guarantors for the facility. When the plaintiff defaulted in its repayment, the defendant instituted an action for the outstanding amount ('Suit 339'). While the hearing for the summary judgment application was pending, the plaintiffs had initiated a discussion to settle Suit 339. The parties entered into a consent judgment which had a term, inter alia, that the plaintiffs remit the initial payment of RM2m by 28 April 2016. However, the plaintiffs issued a cheque dated 30 April 2016 for the said amount, beyond the date for payment of 28 April 2016. Due to the breach of the consent judgment, the defendant initiated various proceedings against the plaintiffs. After more than nine months from the date of the consent judgment, the plaintiffs filed originating summons to set aside the consent judgment on the ground that it was invalid. The defendants responded by filing this striking out application ('encl 4').

Held, allowing encl 4:

(1) The plaintiffs never registered any protest against the consent judgment. In fact, their conduct demonstrated the opposite. The plaintiffs actually issued the cheque for RM2m in purported compliance with the terms of the consent judgment on the requirement for the initial payment. The had sought to act on the very terms of the consent judgment. The attempt to now set aside the consent judgment was nothing but an afterthought and a desperate attempt to restrain the defendant from pursuing its rights under the consent judgment. The plaintiffs should be estopped from taking this contrary position now (see paras 47–48).

(2) A clear injustice would be occasioned to the defendant if its application was refused, even at this early stage, for defaulters such as the plaintiffs would instead be allowed to benefit from their own breach, and thus offends the notion of fairness and justice. The plaintiffs had benefited

from the disbursement of the term loan facility. They then benefited again from the defendant's agreement, as embodied in the essence of the consent judgment the essential part being the non-pursuit of the writ action against the plaintiffs. The plaintiffs sought to invalidate the very consent judgment itself. The court could not lend any further assistance to the plaintiffs (see para 83).

(3) The defendant has more than clearly, on a balance of probabilities succeeded in establishing their case to have the originating summons to be struck out under any one of the grounds stipulated under O 18 r 19(1)(b) and (d) as under O 92 r 4 of the Rules of Court 2012. The action by the plaintiffs was frivolous and vexatious under O 18 r 19(1)(b) and otherwise an abuse of process under O 18 r 19(1)(d) and O 92 r 4. As such, the plaintiffs action was struck out with costs (see para 85).

[Bahasa Malaysia summary

Defendan telah memberi kemudahan pinjaman berjangka sebanyak RM27.5 juta kepada plaintif pertama, sebuah pemaju hartanah. Plaintif kedua hingga kelima adalah penjamin bagi kemudahan tersebut. Apabila plaintif ingkar dalam bayaran balik, defendan memulakan tindakan untuk mendapatkan jumlah tertunggak ('Guaman 339'). Sementara pendengaran untuk permohonan penghakiman ringkas belum selesai, plaintif telah memulakan perbincangan untuk menyelesaikan Guaman 339. Pihak-pihak telah menandatangani penghakiman persetujuan yang mengandungi terma, antara lain, bahawa plaintif menyerahkan bayaran awal sebanyak RM2 juta pada 28 April 2016. Walau bagaimanapun, plaintif mengeluarkan cek bertarikh 30 April 2016 untuk amaun tersebut, melebihi tarikh bayaran pada 28 April 2016. Oleh kerana melanggar penghakiman persetujuan, defendan memulakan pelbagai prosiding terhadap plaintif. Selepas lebih daripada sembilan bulan dari tarikh penghakiman persetujuan, plaintif memfailkan saman pemula untuk mengetepikan penghakiman persetujuan atas alasan ia tidak sah. Defendan membalas dengan memfailkan permohonan pembatalan ini ('lampiran 4').

Diputuskan, membenarkan lampiran 4:

(1) Plaintif tidak pernah mendaftarkan sebarang protes terhadap penghakiman persetujuan. Malah, tindakan mereka menunjukkan sebaliknya. Plaintif sebenarnya mengeluarkan cek sebanyak RM2 juta dengan tujuan mematuhi terma penghakiman persetujuan iaitu keperluan bayaran awal. Mereka cuba bertindak berdasarkan terma penghakiman persetujuan. Percubaan untuk mengetepikan penghakiman persetujuan tersebut hanya satu fikiran semula dan percubaan terdesak untuk menghalang defendan daripada mendapatkan haknya bawah penghakiman persetujuan. Plaintif harus diestop daripada mengambil kedudukan bertentangan (lihat perenggan 47–48).

(2) Ketidakadilan yang jelas akan berlaku kepada defendan jika permohonannya ditolak, malah pada tahap awal ini, jika peminjam seperti plaintif dibenarkan mendapat keuntungan dari pelanggaran mereka sendiri, dan dengan demikian melanggar tanggapan keadilan yang saksama. Plaintif telah mendapat manfaat daripada bayaran kemudahan pinjaman berjangka. Mereka kemudian mendapat manfaat lagi daripada perjanjian defendan, seperti yang terkandung dalam inti pati penghakiman persetujuan iaitu tidak meneruskan tindakan writ terhadap plaintif. Plaintif berusaha membatalkan penghakiman itu sendiri. Mahkamah tidak boleh memberi bantuan lanjut kepada plaintif-plaintif (lihat perenggan 83).

(3) Defendan lebih daripada jelas, atas imbangan kebarangkalian, berjaya membuktikan kes mereka untuk membatalkan saman pemula di bawah mana-mana alasan yang ditetapkan di bawah A 18 k 19(1)(b) dan (d) seperti di bawah A 92 k 4 Kaedah-Kaedah Mahkamah 2012. Tindakan plaintif adalah remeh dan menyusahkan di bawah A 18 k 19(1)(b) dan sebaliknya satu salah guna proses di bawah A 18 k 19(1)(d) dan A 92 k 4. Oleh itu, tindakan plaintif dibatalkan dengan kos (lihat perenggan 85).]

Notes

For cases on consent judgment, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5172–5190.

Cases referred to

Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1, HC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd [2016] MLJU 1878; [2016] 10 CLJ 247, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Bank Simpanan Nasional v Axis Line Entertainment Sdn Bhd & Ors [2017] MLJU 541; [2017] 1 LNS 667, HC (refd)

Bank Simpanan Nasional v Rudysham bin Abdul Raof [2016] MLJU 909; [2017] 4 CLJ 234, HC (refd)

Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple) [2009] 6 MLJ 145; [2009] 2 MLRA 579, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Bukit Baru Villas Sdn Bhd v Malaysia Building Society Berhad [2016] MLJU 1893; [2017] 1 MLRH 1 (refd)

Ganapathy Chettiar v Lum Kum Chum & Ors Meenachi v Lum Kum Chum & Ors [1981] 2 MLJ 145, FC (refd)

HLE Engineering Sdn Bhd v HTE Letrik Bumi JV Sdn Bhd [2015] 2 MLJ 661, CA (refd)
Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192, CA (refd)
Hong Kwi Seong v Ganad Media Sdn Bhd and another appeal [2013] 6 MLJ 765, FC (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
Kang Hock Hin v Tan Bon Kiat [2015] MLJU 926; [2015] 1 LNS 554, HC (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223; [1996] 1 AMR 846, CA (refd)
Lee Teng Siong v Lee Geok Thye Holdings Sdn Bhd [2004] 5 MLJ 13; [2003] 4 CLJ 834, HC (refd)
Low Cheng Soon v TA Securities Sdn Bhd [2003] 1 MLJ 389; [2002] MLRA 298, CA (refd)
Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor [2011] 5 MLJ 219, CA (refd)
Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd [2013] 4 MLJ 520, CA
Moss Steamship Co Ltd v Whinney [1912] AC 254, HL (refd)
Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers) [2003] 4 MLJ 647, CA (refd)
Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309, CA (refd)
Perwira Affin Bank Bhd v Sardar Mohd Roshan Khan [2009] 4 MLJ 201; [2009] 1 MLRA 540, CA (refd)
Prestaharta Sdn Bhd v Ahmad Kamal bin Md Alif & Ors [2016] 4 MLJ 39, CA (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)
RHB Bank Bhd v Nutriwira Sdn Bhd & Ors [2016] MLJU 1582; [2016] 1 LNS 1811, HC (refd)
Royal British Bank v Turquand [1843-60] All ER Rep 435 (refd)
Score Option Sdn Bhd & Anor v Duar Tuan Kiat & Ors [2013] 5 MLJ 716, CA (refd)
Tan Geok Lan v La Kuan @ Lian Kuan [2004] 3 MLJ 465; [2004] 2 CLJ 301, FC (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1, PC (refd)
Ultra Dimension Sdn Bhd v Sepadan Tuah Sdn Bhd [2000] MLJU 231; [2000] 6 CLJ 548, HC (refd)
Waugh and Others v HB Clifford & Sons Ltd and another [1982] Ch 374, CA (refd)

A *Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors* [2009] 6 MLJ 863, CA (refd)

Legislation referred to

B Bankruptcy Act 1967 s 38(1)(a)
Companies Act 1965 s 233(2)
Contracts Act 1950 s 2(d)
Rules of Court 2012 O 18 r 19(1), (1)(b), (1)(d), O 42 r 13, O 92 r 4

Ooi She Yi (Ooi's Chambers) for the plaintiff.
C *Helmi Hamzah (Muhammad Ezwar Rusydan with him) (Hisham, Sobri & Kadir) for the defendant.*

Mohd Nazlan J:

D INTRODUCTION

[1] This is an application documented as encl 4 filed by the defendant to strike out the originating summons of the plaintiffs which seeks to set aside a consent judgment.
E

[2] At the conclusion of the hearing, I allowed the application and highlighted the principal grounds for the same. This judgment contains the full reasons for my decision.

F KEY BACKGROUND FACTS

The facility

G **[3]** The background to this litigation is not complicated. The defendant, a development financial institution, granted a term loan facility of RM27.5m to the first plaintiff, a property developer in pursuance of a financing facility agreement executed by the parties on 28 August 2012 ('the facility agreement'). A specific debenture dated 28 August 2012 had also been entered into between
H the first plaintiff and the defendant as part of the security arrangement, whereby a fixed charge was created over the project land. The second, third, fourth and fifth plaintiffs are the guarantors for the facility.

The default and the consent judgment

I **[4]** The plaintiff defaulted. The defendant as a result instituted a writ action vide Kuala Lumpur High Court Civil Suit No 22NCC-339–10 of 2015 for the recovery of the amount outstanding under the facility ('Suit 339'). Whilst the

hearing for the summary judgment application filed by the defendant was pending, the plaintiffs had on 12 April 2016 initiated a discussion to settle Suit 339.

[5] After the defendant furnished its terms of settlement in a counter proposal, the defendant and all the five plaintiffs herein agreed to record a consent judgment of Suit 339 on 14 April 2016 ('consent judgment') in the presence of solicitors for all parties.

[6] The consent judgment contains, for the purposes of this judgment, the following key terms. First, pursuant to the plaintiffs' request to pay the outstanding by 31 July 2016, the total amount outstanding and payable by the plaintiffs to the defendant as at 31 July 2016 was agreed to be RM29,779,351.45.

[7] Secondly, this extension of time for payment was however subject to the plaintiffs making an initial payment of RM2m to the defendant by 28 April 2016.

[8] Thirdly, should the plaintiffs fail to adhere to the requirement for the initial payment, the plaintiffs would be liable to pay the original outstanding amount prior to the extension, together with interests thereon, and at the same time the defendant would be entitled to enforce its rights under the security documents as stated in the consent judgment.

[9] In a purported compliance with the requirement for the initial payment, the plaintiffs issued a cheque dated 30 April 2016 for RM2m vide the plaintiffs' solicitor's letter dated 28 April 2016. This was thus beyond the date for payment of 28 April 2016.

The breach of consent judgment

[10] Due to the plaintiffs' failure to remit the initial payment of RM2m by 28 April 2016, the defendant's solicitor informed the plaintiffs in a letter of 3 May 2016 that they had failed to comply with the terms of the consent judgment. In any event, as it turned out, the cheque was also dishonoured. Given the plaintiffs' non-adherence to the terms of the consent judgment, the defendant's solicitor vide demanded payment from the plaintiffs. This went unheeded.

[11] As a consequence, the defendant initiated various proceedings against the plaintiffs. These are:

(a) against the first plaintiff, presented a winding up petition on 3 August 2016 vide Kuala Lumpur High Court Petition No WA-28NCC-656–08 of 2016;

(b) against the first plaintiff, exercised the appointment of a receiver and manager on 21 June 2016, under the said specific debenture for the first plaintiff vide deed of debenture dated 21 June 2017;

(c) against the second plaintiff, based on a petition filed by the defendant vide Kuala Lumpur High Court Petition No WA-28NCC-657–08 of 2016, on 10 March 2017 obtained a winding-up order against the second plaintiff;

(d) against the third plaintiff, commenced on 27 May 2016 a bankruptcy proceeding vide Kuala Lumpur High Court Bankruptcy No WA-29NCC-2503–05 of 2016;

(e) against the fourth plaintiff, commenced on 27 May 2016 a bankruptcy proceeding vide vide Shah Alam High Court Bankruptcy No BA-29NCC-4940–05 of 2016; and

(f) against the fifth plaintiff, on 10 March 2017, obtained a receiving order and adjudication order against the fifth plaintiff vide Kuala Lumpur High Court Bankruptcy No WA-29NCC-2504–05 of 2016.

The action in encl 1 to set aside consent judgment

[12] However after more than nine months from the date of the consent judgment, the plaintiffs on 23 January 2017 filed the originating summons in encl 1 to set aside the consent judgment.

[13] The plaintiffs claim that the consent judgment was invalid. In summary, the key grounds put forth by the plaintiffs to have the consent judgment set aside, in a fashion organised by the plaintiffs, and as repeated at the hearing, are as follows:

(a) the plaintiffs had never given their consent to the recording of the consent judgment on the terms stated therein;

(b) the terms stated in the consent judgment are different from what had been agreed between the plaintiffs and their solicitors;

(c) the consent judgment had been entered into under mistake of facts/law;

(d) the effect of the consent judgment is extensive such that several execution proceedings including bankruptcy and winding-up had been initiated against the plaintiffs;

(e) the plaintiffs were previously under the impression that the consent judgment, despite had never been agreed upon, could not be set aside;

(f) the first plaintiff does not require the consent from the receivers and managers in order to proceed with this setting aside application; and

(g) the alleged consent judgment has insufficient or no consideration.

The instant striking out by the defendant

[14] The defendant responded by filing this striking out application in encl 4, which is resisted by the plaintiffs. I will deal with the issues raised by the defendant and the responses proffered by the plaintiffs in opposition in my analysis of the same below. Most of the issues however revolve around the grounds relied on by the plaintiffs in support of their setting aside application in encl 1.

[15] Before I examine the arguments and the affidavit evidence made available, I must first mention briefly about the law governing applications to strike out claims.

THE LAW ON STRIKING OUT

[16] The starting point of reference must be O 18 r 19(1) of the Rules of Court 2012 ('the RC 2012') which reads as follows:

> 19 Striking out pleadings and endorsements (O 18 r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious:
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[17] The defendant in the instant case relies on both of limbs (b) and (d). Thus the defendant argues that the claim commenced by the plaintiffs is frivolous and vexatious, and is an abuse of court process.

[18] The leading authority on O 18 r 19(1) is the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, and in particular, the following part of the judgment of Mohamed Dzaiddin SCJ (as he then was):

A The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86 at p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or B answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there is a C point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

D

[19] It is therefore well established that the power of the court to strike out under the four grounds of O 18 r 19(1) is to be exercised when it can clearly be determined that a claim or answer is prime facie obviously unsustainable (see the Court of Appeal decision of *Metroplex Holdings Sdn Bhd v Commerce* E *International Merchant Bankers Bhd* [2013] 4 MLJ 520 referred to by the plaintiffs). It is also only to be invoked sparingly (see *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1).

[20] It could also be said that as for limb (b), the test is the same F consideration on the claim being obviously unsustainable and that for limb (d), it arises when the process of the court is not used in a bona fide manner and has been abused (see the Court of Appeal decision in *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192) and the said claim must also be proven to be obviously unsustainable (see another Court of Appeal G decision of *Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors* [2009] 6 MLJ 863).

[21] It is equally clear as it is practical that the situations that could fall H within the categories under limb (d) are never closed given the variety of circumstances arising from the facts of each particular case. The categories of cases where the process of the court could be abused are varied as they are numerous. They are non-exhaustive (see *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637).

I

[22] And, as established by the Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, the courts have the inherent jurisdiction to prevent an abuse of its process.

[23] The court is permitted, in an application other than under limb (a) (on the ground of no reasonable cause of action) to examine the affidavit evidence instead of merely the pleadings in the statement of claim of the plaintiff (see *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309), and where necessary scrutinise them with a fine tooth comb (see *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1).

[24] For completeness, I should add that the defendant is also premising its strike out request under O 92 r 4 on the inherent jurisdiction of the court. A striking out on the ground of abuse of process under O 92 r 4 of the RC 2012 can be invoked and justified on considerations of public policy and interest of justice (see the Federal Court decision in *Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145; [2009] 2 MLRA 579).

EVALUATION AND FINDINGS OF THIS COURT

[25] The grounds raised by the defendant to justify its application to strike out the claim of the plaintiffs, the latter's responses and the analysis and findings of this court are as follows:

The originating summons was filed out of time

[26] The defendant argues that the action by the plaintiffs to set aside the consent judgment O 42 r 13 of the RC 2012 was filed out of time, and does not comply with the requirements of the said O 42 r 13, and O 92 r 4 of the RC 2012.

[27] Order 42 r 13 of the RC 2012 prescribes that an application to set aside a judgment or order of the court ought to be made within 30 days of the receipt of the judgment or order by the applicant. It reads as follows:

> 13 Setting aside or varying judgment and orders (O 42 r 13)
>
> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[28] It is not denied that the consent judgment was recorded on 14 April 2016. It was served on the plaintiffs a day after, on 15 April 2016. But it is only a good nine months and nine days later on 23 January 2017 that the plaintiffs filed the originating summons in encl 1 to set aside the consent judgment. I say that this surely is an inordinate delay on the part of the plaintiffs.

[29] In the first place, the word 'shall' in O 42 r 13 is mandatory in nature (see the Court of Appeal decision in *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389; [2002] MLRA 298). Its mandatory nature is plain and obvious. Its rationale too is manifest, for it will absolutely run contrary to the requirements of finality and certainty of binding orders of the court if litigants are at liberty to file any orders or judgments of the court at any time, frustrating the realisation of the fruits of litigation of the winning party, and at a higher and more fundamental level brings the legal system into disarray.

[30] Secondly, and more importantly, the consequence for non-compliance with the time stipulation under O 42 r 13 is trite. The application must be refused. In the Federal Court decision in *Hong Kwi Seong v Ganad Media Sdn Bhd and another appeal* [2013] 6 MLJ 765, Suriyadi FCJ held instructively thus:

> [12] In other words a party intending to set aside an order or judgment must make his application and serve it on the party who obtained the order or judgment within thirty days after receipt of the order or judgment by him. *If the application is made outside the thirty day period, unless time is enlarged, the application must fail* (*Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors* [2002] 7 MLJ 430; [2002] 3 CLJ 108). Whether an enlargement of time will be granted, on the premise that an application was been filed, will depend very much on the facts and circumstances of that application (*VVDN Sockalingam Chettiar And Two Others v KRPRSM Somasundaram Chettiar* [1941] 1 MLJ 103 (CA)).
>
> [13] It is crystal clear that no enlargement of time was ever applied for by the appellant prior to the filing of encls 129–130. A brief scrutiny of the dates of all of the relevant orders, and their dates of service, shows that the appellant was out of time by at least a year. Despite knowing that encls 129–130 were filed pursuant to O 42 r 13 of the RHC the appellant had disregarded the time factor prescribed to regularise the application. *With no application filed to extend time pursuant to O 3 r 5 of the RHC prior to filing of those applications (and of course no reasonable explanation was given for the said delay), encls 129–130 were incompetent.*
>
> [14] *The failure to adhere to the preliminary requirement to extend time in the circumstances of the case must be dealt with strictly, as otherwise the rules requiring an extension of time will end up as a dead letter.* They, prima facie, must be obeyed for otherwise the party in breach of the rules will defeat the very purpose and object of the need to observe the time line (as an analogy see *Ong Guan Teck & Ors v Kasturi* [1982] 1 MLJ 105; [1982] CLJ Rep 616. (Emphasis added.)

[31] Case law authorities have held that where there is delay on the part of an applicant to act with reasonable promptitude to apply to set aside a judgment within the stipulated 30 day period, it is incumbent upon the applicant to discharge the burden of proffering a satisfactory explanation for the delay. Thus, if there is no explanation for the delay and there is no application for an extension of time to apply, the Court of Appeal in *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers)* [2003] 4 MLJ 647 held

that the setting aside application should be dismissed in limine, without considering the merits of the application.

[32] Whether any purported explanation in a given case is satisfactory or otherwise would plainly be dependent on the facts and circumstances of each application and it is for the court to exercise its discretion to make the determination (see the Court of Appeal decision in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; [1996] 1 AMR 846).

[33] The plaintiffs herein sought to advance the explanation that they were late in making the application to set aside the consent judgment because the plaintiffs claim to be lay persons, without legal knowledge and they had also not received proper legal advice from their previous solicitors on the consent judgment.

[34] I do not find the arguments advanced and the averments made by the plaintiffs in the affidavits to be anything but a bare assertion without evidential support. The assertion of being lay persons is too convenient if not disingenuous at the same time. As I have stated earlier, the starting point of this relationship between the plaintiffs and the defendant is the facility of RM27.5m granted to the first plaintiff, and guaranteed by the other plaintiffs, who were also the directors of the first plaintiff at the material time. This is a major loan facility. The plaintiffs are entities and men of business. They cannot claim ignorance of the law or the terms of the facility agreement or any of the security documents. In any event, the plaintiffs' involvement in the facility agreement, the defence of the Suit 339 and the consent judgment were as is commonly the industry practice in such corporate loan transactions, assisted by their own lawyers. Their reliance on the argument which attribute blame on their previous lawyers is misconceived. More on this later.

[35] The context of the background to the consent judgment must be appreciated too. The agreement in the form of the consent judgment which was reached among the parties had the effect of the defendant not proceeding with the Suit 339 against the plaintiffs, which at that juncture, were awaiting the hearing for the defendant's summary judgment application against the plaintiffs. The plaintiffs had first defaulted under the facility agreement, and had every reason to get the defendant not to pursue the Suit 339 and agreed to the consent judgment.

[36] Yet, despite the consent judgment containing terms delaying payment of the outstanding by the plaintiffs, they failed to adhere to the same by not making the initial payment. And now after some nine months, and after the defendant vigorously pursuing enforcement proceedings against the plaintiffs,

the plaintiffs quite conveniently file an application to set aside the consent judgment, and brazenly assert lack of knowledge on the effect of the consent judgment for the delay.

[37] This is far from being a satisfactory explanation for the delay. It is not a genuine explanation even. It cannot be accepted. The originating summons of the plaintiffs must fail on this ground of unexplained and inordinate delay alone.

[38] Further, I reiterate that the plaintiffs' inordinate delay in their filing of the originating summons sans any application for extension of time is fatal. As highlighted by the defendant, in *RHB Bank Bhd v Nutriwira Sdn Bhd & Ors* [2016] MLJU 1582; [2016] 1 LNS 1811, I stated thus:

> [22] As I have stated in *RNS Oil and Gas Sdn Bhd v Norhayati binti Ahmad Kamal* [2016] 6 AMR 668, Orders 1A and2 are not and cannot be the true answer to every transgression of the rules of court. The court will not cure the failure to comply with requirements which are mandatory in nature such as those stipulated in O 42 of the RC 2012. Where rules are mandatory, and explanation for the violations deemed unacceptable, considerations of lack of prejudice (as what is also contended by the first and second third parties in the instant case) and absence of substantial miscarriage of justice to the second defendant, whilst relevant, become secondary. When explanation for the non-compliance is not forthcoming or not acceptable, the infringement is more likely to have been intentional or at the minimum involve a reckless disregard for the rules of court, which the Court will at any rate not countenance.
>
> [23] This is absolutely in consonant with the pronouncement made by Zaki Tun Azmi CJ in *DYMM Tunku Ibrahim ibni Sultan Iskandar Al-Haj v Datuk Captain Hamzah b Mohd Noor (and another appeal)* [2009] 5 AMR 298 in the following terms: ...

[39] The delay being inordinate and not satisfactorily explained, it seems clear that the plaintiffs conveniently filed the originating summons after the various legal steps were initiated by the defendant against the plaintiffs. As steps had already been taken in respect of the consent judgment by the other party, an applicant's attempt to set aside the consent judgment becomes more difficult to succeed. In a case also involving a delay in an application to set aside a consent judgment in *Bank Simpanan Nasional v Axis Line Entertainment Sdn Bhd & Ors* [2017] MLJU 541; [2017] 1 LNS 667, I stated the following:

> [53] The fact that bankruptcy proceedings against the appellant had already been initiated by the respondent further renders the application to set aside even more difficult to justify, for case-law authorities have shown that a setting aside application ought to be refused if a defendant fails to apply to set aside the default judgment within the stipulated 30 day period and where the plaintiff had instead taken a fresh step in filing a winding up petition.
>
> [54] Thus in the Court of Appeal decision in *Mirra Sdn Bhd v The Ayer Molek*

Rubber Company Bhd [2008] 3 CLJ 273 it was instructively held as follows:

> Nonetheless, I shall venture to add that the respondent was also guilty of delay in applying to set aside the default judgment. Under O 42 r 13 of the Rules of the High Court (RHC), the respondent is required to apply to set aside the default judgment within 30 days from the date of receipt of the judgment order. This, the respondent failed to do within the prescribed time. And by the time when this application was made, the appellant had taken a fresh step in filing a petition to wind up the respondent. When the respondent had failed to act '(a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity (see O 2 r 2(i) of the Rules of the High Court 1980' — per Edgar Joseph Jr FCJ in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* then the court should not come to his aid in setting aside the default judgment.

[40] As such not only was the delay in filing the action to set aside the consent judgment inordinate and not satisfactorily clarified, it was also not accompanied with a request for time extension and made only after steps had been taken to commence winding up and bankruptcy proceedings against the plaintiffs. These, for all intents and purposes, render the case of the plaintiffs virtually untenable.

The consent judgement is binding on the parties and the plaintiffs had already acted on the consent judgment

[41] In the first place, the law is so well settled that a consent judgment can only be set aside on specific grounds, as established by the Federal Court in the leading case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 where Peh Swee Chin FCJ, in one of the judgments delivered by the Federal Court stated instructively as follows:

> The grounds referred to for setting aside a consent order of a judgement by consent are grounds which basically relate to *consensus ad idem* or the free consent of parties to a binding agreement or contract. It is elementary that if it is proved that there are grounds which vitiate such free consent, the agreement is not binding. Now a consent order or a judgement by consent is undoubtedly based on an agreement of both parties where consent to the agreement must or should have been free in the first place. *If the agreement upon which a consent order or judgement by consent is based, is vitiated by any ground recognised in equity as vitiating such free consent, such as fraud, mistake, total failure of consideration* (see *Huddersfield Banking Co Ltd v Henry Lister & Sons* [1895] 2 Ch 273 and the cases cited therein), then such a perfected consent order or judgement by consent could be set aside in a fresh action filed for the purpose. *Grounds which would vitiate such free consent should also include misrepresentation, coercion, and undue influence and other grounds in equity.* (Emphasis added.)

[42] It is of relevance to note that the plaintiffs did not in their originating summons or in any of affidavits in reply make mention of, let alone specifically plead any of the aforesaid grounds established by *Badiaddin Mohd Mahidin* that could legitimately justify the plaintiffs setting aside the consent judgment, apart from an allegation of mistake. There was no allegation of fraud or misrepresentation, and indeed it would have resolutely been disingenuous if the plaintiffs had alleged coercion on the part of the defendant who had actually accommodated the plaintiffs by allowing the extension of time in the consent judgment.

[43] Secondly, the concept of a consent judgment being a contractual agreement having the force of law has been affirmed in the Federal Court decision in *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465; [2004] 2 CLJ 301. Mohd Noor Ahmad FCJ delivering the judgment of the court held thus:

> a consent judgment or order is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the court, and its force and effect derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent judgment or order. A consent order must be given its full contractual effect, even if it relates to an interlocutory step in the action (see para 390 at p 286, *Halbury's Laws of England* (4th Ed, Vol 37)). We gather from this proposition that: (i) the agreement on the terms reached between the parties at the interlocutory stage of an action is a contract between the parties; and (ii) the consent judgment or order arising out of that contract is also a contract between the parties except that the latter is superadded with the command of the court. In short, there are two contracts, one, before the court makes the order and two, after the order is made. After the order is made the first contract merges into the second contract. That being the case, short of the order being made, the first contract will have to be separately considered on its binding effect based on incidents of a contract.

[44] It was also earlier held by the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* that as such, a consent order or judgment, like the consent judgment presently could only be set aside on the same grounds to set aside an agreement.

[45] Under established principles of the law, the consent judgment therefore remains valid, binding and enforceable. There is no court order staying the execution of the consent judgment. As such, the consent judgment entered by the parties remains absolutely intact and binding on the parties.

[46] In *Bukit Baru Villas Sdn Bhd v Malaysia Building Society Berhad* [2016] MLJU 1893; [2017] 1 MLRH 1, a case referred to by the defendant, which facts are not so dissimilar to those presently, I struck out the plaintiff's suit and made the following observation:

> [32] The essence of the indebtedness of the plaintiff to the defendant is encapsulated in the Consent Judgment, which by definition evidences the former's admission to the same, and records, under the sanction of the Court, the agreement by parties on the repayment arrangement. In the absence of any legally recognized basis to impugn the continued validity of the Consent Judgment which remains resolutely unchallenged and unimpaired, its terms must continue to be binding and govern the relationship between the plaintiff and the defendant in respect of the indebtedness. Any attempt by the plaintiff to depart or move away from strictly adhering to the same would thus tantamount to a form of non-compliance, if not an outright transgression ... Having infringed the terms of the Consent Judgment, the plaintiff cannot now turn around and attempt to argue on the strength of some spurious grounds that the terms cannot now be relied on by the defendant ... As identified above, the disputes in the instant case are far from being material, and the arguments by the plaintiff on the purported disputes are either bereft of merit or merely a convenient and an unsubstantiated afterthought at the same time.
>
> [33] The Consent Judgment continues to be valid and is not varied or set aside, and the issue of Fortuna Injunction already res judicata, the basis of the plaintiff pursuing the suit becomes doubtful and in my view may thus justifiably be construed as being frivolous and vexatious instead, as well as an abuse of the process of the Court, for there is little consequence in allowing the same be proceeded with when the essence of the plaintiff's complaint on the extent of indebtedness vis-a-vis the Section 218 Notice has been shown to be plainly very short on substance and decidedly unmeritorious. In other words, the claim is obviously unsustainable. At the same time, in addition, coupled with the other arguments raised by the plaintiff as discussed in the earlier part of this judgment, the plaintiff has unmistakably not demonstrated any triable issues that could provide the basis for the claim of the plaintiff not to be struck out and to be pursued and heard in a full trial instead.

[47] In the instant case before me, the plaintiffs never registered any protest against the consent judgment before. In fact, their conduct demonstrated the opposite. As mentioned earlier, the plaintiffs had actually issued the cheque for RM2m in purported compliance with the terms of the consent judgment on the requirement for the initial payment. Plainly therefore, they had sought to act on the very terms of the consent judgment. This bolsters the defendant's submission that the attempt to now set aside the consent judgment by the plaintiffs is nothing but an afterthought and a desperate attempt to restrain the defendant from pursuing its rights under the consent judgment.

[48] The plaintiffs should be estopped from taking this contrary position now (see the leading Federal Court decision in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283). And at the same time the plaintiffs cannot blow hot and cold. They cannot approbate and reprobate. In the case of *Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd* [2016] MLJU 1878; [2016] 10 CLJ 247, I stated thus:

> [43] The position taken by the plaintiffs currently may be characterised as one which violated the principle against 'approbating and reprobating'. In the Court of

Appeal case of *Visage Continental Sdn Bhd v Smooth Track Sdn Bhd* [2007] 6 CLJ 570, Richard Malanjum JCA (as His Lordship then was) referred to various authorities and enunciated clearly the rule that a party should not be allowed to approbate and reprobate as it is a practice that is both plainly unconscionable and unfair.

[49] Reference must in this regard also thus be made to the recent Court of Appeal decision of *Prestaharta Sdn Bhd v Ahmad Kamal bin Md Alif & Ors* [2016] 4 MLJ 39 where the court made the following observation against approbating and reprobating:

(j) arising from the above, it is abundantly clear that the plaintiffs are 'blowing hot and cold' with an obvious intent to defeat the clear and unambiguous terms and covenants they had entered with the developer pursuant to their respective S&P's and DMC ...

(k) thus, in the case of *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761, the Court of Appeal said of the principle of approbation and reprobation as follows:

> We categorically say that the liquidator cannot blow hot and cold to suit him whenever he feels like it. He cannot approbate and reprobate in the same breath. On the one hand, he claims that the High Court order dated 26 July 2001 overrides or displaces a stature which render the said order invalid and yet he has the audacity to continue to act as a liquidator by virtue of the said order. In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers plc v News (UK) Ltd and others* [1990] 3 All ER 376 at pp 383–384:
>
> > There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

[50] The plaintiffs cannot sustain the originating summons in the absence of any valid basis to set aside the consent judgment which they themselves have acted on. They simply therefore cannot succeed.

Grounds to set aside consent judgment unsustainable

[51] The plaintiffs alleged a number of issues to invalidate the consent judgment. None of them is however of substantive worth or merit. The plaintiffs asserted that the consent judgment was entered into by the previous solicitors without proper authority and without the plaintiffs' approval and in the absence of any resolution by the corporate boards of the first and second plaintiffs.

[52] In addition, the plaintiffs submitted that the consent judgment was entered under misapprehension and mistake to the fact and law, where the consent judgment of 14 April 2016 was found to be very different from the terms of settlement as discussed in the plaintiffs' solicitors' letter dated 12 April 2016. And that given the need for boards' approvals, the consent judgment could not have been agreed on within such a short time period.

[53] The plaintiffs argued that it could have been the case that their previous solicitors mistakenly believed that they had the authority to enter into the consent judgment on behalf of the plaintiffs despite the latter's lack of knowledge of the terms until they were perfected in the consent judgment.

[54] The plaintiffs referred to two High Court decisions in *Kang Hock Hin v Tan Bon Kiat* [2015] MLJU 926; [2015] 1 LNS 554 and *Ultra Dimension Sdn Bhd v Sepadan Tuah Sdn Bhd* [2000] MLJU 231; [2000] 6 CLJ 548, which according to them illustrated the principle that mistakes by solicitors should not jeopardise the client's case.

[55] I do not think these cases truly support the position of the plaintiffs. In the former, the solicitor was found to have been responsible for the judgment in default of defence obtained against the plaintiff. In the latter, the mistake in pleadings was attributed to the solicitors. In neither was the context involving the setting aside of an order or judgment of the court.

[56] Further, in absence of making any credible pleading on fraud against the defendant, the plaintiffs could not now seek to impugn the validity of the consent judgment on the allegation that the plaintiffs' previous solicitor had no mandate to enter the consent judgment.

[57] On the contrary, it is not an inaccurate a statement to make that it is fairly well settled that lack of mandate of the lawyer is not a valid ground to have a consent judgment set aside. The English Court of Appeal has held to such effect in *Waugh and Others v HB Clifford & Sons Ltd and another* [1982] Ch 374, as follows:

> The law has become well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client ...
>
> Thus, counsel's alleged lack of authority is invariably never a ground to set aside a consent order or a contract. Any injustice suffered by the client could be resolved in the context of a claim against his counsel.

[58] Similarly in our jurisdiction, it has been held by the High Court in *Lee Teng Siong v Lee Geok Thye Holdings Sdn Bhd* [2004] 5 MLJ 13; [2003] 4 CLJ

834 that a counsel's lack of mandate would not be a valid ground to set aside a consent order. The following key passages from the judgment of Vincent Ng J are instructive:

> The applicants' complaint of alleged lack of authority of their counsel and solicitor is without substance, as there is no affidavit from their counsel, solicitor, respondent or other contributories as to the lack of or for misapprehension of his authority (see *Lewis v Lewis* (890) 45 Ch D 281). And, the fact that negotiation took place over a period of three days clearly showed that all the contributories had authorised their counsel and solicitor to negotiate and conclude a settlement. Counsel and solicitor in the ordinary course of their retainer have the power to enter into compromise or settle disputes (see *Sourendra Nath Mitra and Others v Tarubala Dasi* [1930] 57 Indian Appeals 133 at pp 138–142 per Lord Atkin; *Teh Eok Kee & Anor v Tan Chiah Hock & Anor* [1996] 2 CLJ 227). In the course of his judgment in *Waugh v HB Clifford & Sons Ltd* [1982] Ch 374, Brightman LJ reviewed a number of the authorities referred to in the foregoing discussion on implied authority and said this (at p 387):
>
> > The law has become well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matters 'collateral to the action'; and ostensible authority, as between himself and the opposing litigant to compromise the suit without actual proof of authority, subject to the same limitation ...
>
> *Thus, counsel's alleged lack of authority is invariably never a ground to set aside a consent order or a contract. Any injustice suffered by the client could be resolved in the context of a claim against his counsel (see Waugh v HB Clifford & Sons Ltd; Leow Seng Huat v Low Mui Yein* [1996] 2 BLJ 466*). There is no obligation to prove express authority. A solicitor or counsel by implication had authority to compromise. The petitioner and the court, are entitled to assume the existence of authority when the lack of authority is not specifically brought to the attention of the petitioner or the court at that material time.*

[59] As such, in the instant case, the plaintiffs' assertion concerning their former solicitors' lack of authority in entering into the consent judgment must fail. In addition, if the plaintiffs genuinely have a gripe against their former solicitors, it is for them to take it up with their former solicitors; for it cannot validly form a premise for the setting aside of the consent judgment. And neither, in any event, is there any affidavit or any form of confirmation from the former solicitors of the plaintiffs forthcoming on the question of whether they were properly authorised to agree to the terms of the consent judgment.

[60] Instead, from the date of the consent judgment until the filing of the originating summons in encl 1, the plaintiffs did not seek to challenge the authority of their former solicitors to record the consent judgment on their behalf. The plaintiffs' sudden allegation on the lack of mandate in the instant suit is but another manifestation of an afterthought which cannot be countenanced.

[61] Nor can the contention that the terms of the consent judgment did not reflect their proposed terms and there must therefore have been a mistake, considering the short period of time after discussion, be considered as anywhere near tenable. In the first place, as mentioned earlier, the plaintiffs had acted on the consent judgment by purporting to make payment of RM2m by cheque. The payment was by the plaintiffs, not by their solicitors, present or former. This thus already demolishes the argument of mistake posited by the plaintiffs.

[62] Moreover, as stated earlier, the whole idea of the consent judgment can be traced to the default of the facility agreement by the plaintiffs which subsequent writ action for recovery, in particular the summary judgment application was settled by way of the consent judgment which in turn was subsequently breached by the plaintiffs. The underlying originating summons only got filed subsequent to various enforcement actions initiated by the defendant against the plaintiffs for recovery.

[63] The consent judgment did not come into existence independently of any court proceedings involving the parties in dispute. The plaintiffs initiated the discussions on settlement which after the entry of the consent judgment was confirmed by the plaintiffs' solicitors' e-mail dated 18 April 2016 to the plaintiffs' representative to have been recorded based on the instruction given by the plaintiffs' representative. For the same reason, the plaintiffs' argument that the consent judgment was entered into without the mandate of the boards of the first and second defendants cannot stand, more so as the defendant was also entitled to rely on the indoor management or *Turquand* rule. In any event, disagreement or miscommunication, if any, between the plaintiffs and their previous solicitors is in this context an internal matter of no consequence to the defendant.

[64] The plaintiffs appear to have changed their minds or worse, never intending to abide by the consent judgment in the first place. On the former, the former Federal Court had ruled that a setting aside of a consent judgment cannot be wilfully done by reason of one of the parties having a change of heart. In *Ganapathy Chettiar v Lum Kum Chum & Ors Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145, the former Federal Court, in the judgment of Raja Azlan Shah CJ (Malaya) held the following:

(1) An order by consent is evidence of a contract between the parties and is binding on all parties to the order all the more so, where there is not the slightest question of any mistake as to facts or law;

(2) Since there had been no mistake on the part of any one when the consent order for the sale by public auction was made, the only possible way in which this could be altered would be by the consent of all the parties;

(3) In this case the learned judge was right in holding that it was too late to withdraw the prayer for sale by private treaty and therefore there was the consent of all the parties which gave him jurisdiction to alter the consent order.

[65] I have warned of the risks of unscrupulous parties to a consent judgment abusing the sanctity of the judgment in *RHB Bank Bhd v Nutriwira Sdn Bhd & Ors* [2016] MLJU 1582; [2016] 1 LNS 1811, and I wish to repeat them here given the similar circumstances:

> [41] Fifthly, if the argument put forth by the first and second third parties herein were accepted, it would unwittingly permit unscrupulous litigants to repudiate a properly recorded consent order or judgment in that the clients could conveniently when it suits them to do so, such as when the clients change their mind about the consent order or judgment, orchestrate with their lawyers the same argument that the terms of a consent order were agreed by the lawyers without authority. Equally brazenly, the collusion could even involve the litigants and their lawyers put up the pretence that there is subsequently a breakdown of relationship between the party and its lawyers and the lawyers no longer cooperating with their former client. All this whilst the litigant conveniently choosing not to take any action against the derelict lawyers.

[66] Thus, the argument on the alleged absence of mandate on the part of the plaintiffs' previous solicitors is of little substantive worth. It too cannot help advance the case of the plaintiffs.

The first plaintiff has no authority to file the originating summons which is thus an abuse of court process

[67] There is much substance in this contention of the defendant. As for the first plaintiff, it is an undeniable fact that in pursuance of the specific debenture dated 28 August 2012 ('specific debenture') and deed of appointment dated 21 June 2016 ('deed of appointment'), a receiver and manager ('R&M') has been appointed over the first plaintiff.

[68] It has been held by the authority of the Court of Appeal in *Score Option Sdn Bhd & Anor v Duar Tuan Kiat & Ors* [2013] 5 MLJ 716 that upon the appointment of receivers and managers, the directors no longer had authority over the company or to act on its behalf.

[69] Indeed, Lord Atkinson in the House of Lords in *Moss Steamship Co Ltd v Whinney* [1912] AC 254 made it clear that:

> This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company ... Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or

otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance.

[70] Given the above ruling, and premised on and section 8.02 of the specific debenture (see below), the R&M is the agent of the first plaintiff. This must mean that upon his appointment, the R&M is the one with the requisite authority to commence action for the first plaintiff. There is no evidence nor basis to suggest that the originating summons is an action against the R&M (which would otherwise obviate the need for the authority of the R&M to initiate the action) or otherwise one that could fall within the category of actions which company directors might have commenced without the necessity of the consent of the receiver and manager.

[71] The plaintiffs argued that consent is not necessary because the specific debenture confines the powers of the R&M only to the property, project and the project land (as defined therein), which do not, it was submitted, therefore extend to matters concerning the consent judgment arising from the said default of the facility agreement. The plaintiffs point to the following clauses of the specific debenture:

Section 8.02: Power of Receiver and Manager.

A Receiver and or Manager or Receivers and or Managers so appointed shall be the agent of the Borrower and shall exercise all powers conferred on a Receiver by the Companies Act, 1965 and by way of addition to and without limiting those powers shall have power in relation to the Property, the Project and the Project Land (as may be applicable):

(a) to take possession of and get in all or any of the assets of the Borrower hereby charged/assigned and for that purpose to take any proceedings in the name of the Borrower or otherwise as may seem expedient;

(d) to sell or concur in selling any of the assets hereby charged, or lease or otherwise deal therewith and on such terms in the interests of MBSB as he or they shall think fit for such purposes to execute such assurances, transfers, lease and any other documents in the name and on behalf of the Borrower or otherwise as he or they may consider necessary or desirable. In exercising the Power of Sale hereby conferred the Receiver and or Manager or Receivers and or Managers may sell at such times in such manner and at such price as he or they may in his or their absolute discretion think fit in exercising discretion he or they may have regard to the views and desires of MBSB. The Receiver and/or Manager shall not be accountable for any loss or damage which may be suffered by the Borrower by reason of the exercise of such discretion.

[72] This argument is fallacious. The opening paragraph of section 8.02 itself states that the R&M is the agent of the first plaintiff and have all powers as conferred by the Companies Act 1965 which are not limited by the additional powers in respect of the property, the project and the project land.

Further, the plaintiffs chose to not highlight para (e) of section 8.02 which specifically states that the R&M shall have the power to institute, defend or discontinue any suit or proceedings in relation to the assets charged under the specific debenture.

[73] Fundamentally, it cannot be disputed that the entire rationale for the specific debenture was to provide security to the defendant as the financier under the facility agreement in respect of the term loan facility granted to the first plaintiff to develop the project land which had been charged by the first plaintiff to the defendant under the specific debenture. It is entirely disingenuous for the plaintiffs to now argue that the setting aside of consent judgment action instituted by them has nothing to do with the project land when it is clear to all and sundry that the very security of the project land was precisely to guard against any default by the first plaintiff of the facility agreement which actually had led to the consent judgment.

[74] Furthermore, subsequent to the filing of the underlying originating summons in January 2017, the same plaintiffs herein in March 2017 instituted a writ action vide Civil Case No WA-22NCVC-112–03 of 2017 ('Suit 112') against the R&M and the defendant herein, challenging the appointment of the R&M and the validity of the specific debenture. The R&M and defendant's application to strike out Suit 112 has been allowed by the High Court, and this was prior to the hearing of the defendant's striking out application before me. Yet, even by the time of the hearing before me, the first plaintiff was still unable to furnish evidence that the consent of the R&M has been secured for the first plaintiff to pursue the originating summons.

[75] Thus the pursuit of this action by the first plaintiff is wholly untenable. It is undertaken without the requisite legal standing and as the law clearly renders it incompetent, it cannot be more aptly characterised other than a case of a patent abuse of process.

[76] As for the second plaintiff, it is a fact that a winding up order was granted on 10 March 2017 against the second plaintiff on the petition by the defendant. As a wound up company, the second plaintiff plainly would be dispossessed of the legal capacity to maintain the action in the originating summons in the absence of the requisite sanction of the official receiver.

[77] In the Court of Appeal decision in *HLE Engineering Sdn Bhd v HTE Letrik Bumi JV Sdn Bhd* [2015] 2 MLJ 661, Abang Iskandar JCA held instructively as follows:

FINDING OF THIS COURT

[18] So, having had the benefit of hearing able submissions by both learned counsel before us, in the light of the materials placed in the record of appeal, we were of the considered view that there were no merits in the contentions advanced by learned counsel for the plaintiff in this appeal. As there was no prior sanction obtained by the plaintiff from the official receiver to continue or maintain its action against the defendant after it was wound up by the court, with respect, its action against the defendant, no longer had any proverbial legs to stand on. In a similar appeal in the case of *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406 based on the issue of lack of sanction, this is what the Court of Appeal had said:

> We are of the view that the action by the appellant against the respondent should be struck out on the ground of failure on the part of the appellant to obtain prior leave or sanction either from the official assignee as liquidator or the court under s 233(2) of the Companies Act 1965.
>
> This a clear case for the court to invoke its power under O 18 r 19 of the RHC 1980, to ensure that any claim brought by the appellant against the respondent has a basis on which the court may adjudicate. With respect, the present claim by the appellant against the respondent is obviously unarguable, unsustainable and an abuse of the process of the court.

[19] Therefore, the long and short of it is this. Once it is established that a company has been wound up and there is no sanction obtained subsequent to that event, it becomes incapacitated in so far as its capacity to sue or to defend a legal suit is concerned. This extends to its capacity to properly maintain or continue a pending suit in court. In our view, no stay order can have a retrospective effect, in the sense that it is incapable of wiping out a winding up order out of existence. As the plaintiff in this appeal had not applied for a sanction upon it being wound up on 6 July 2009 its action against the defendant cannot in law be sustained and had become an abuse of court process. The JC was therefore right in allowing the encl 62 and for having struck out the plaintiff's action against the defendant.

[78] In the absence of the requisite sanction of the official receiver, the action being pursued by the second plaintiff in the originating summon would otherwise suffer from a fatal defect. However, the second plaintiff was able to show the requisite sanction from the official receiver prior to the hearing of this application.

[79] Further, in so far as the fifth plaintiff is concerned, he was already adjudged a bankrupt pursuant to an adjudication and receiving order dated 21 February 2017. In the absence of the requisite sanction of Director General of Insolvency ('DGI') to maintain the instant underlying originating summons, s 38(1)(a) of the Bankruptcy Act 1967 makes it manifest that the fifth plaintiff would otherwise be incompetent to pursue this action against the defendant (see also the Court of Appeal decision in *Perwira Affin Bank Bhd v Sardar Mohd Roshan Khan* [2009] 4 MLJ 201; [2009] 1 MLRA 540).

A However, the fifth defendant was able to show the requisite consent from the DGI prior to the hearing.

Other assertions and considerations

B **[80]** Matters concerning alleged misrepresentation by the defendant concerning the facility is of no relevance to the instant application because the allegation had previously been raised in the counterclaim filed by the plaintiffs in the writ action in Suit 339. But the plaintiff had withdrawn the counterclaim without the liberty to file afresh upon the entry of the consent C judgment. Thus clearly the plaintiffs should be prohibited from seeking to litigate the matter again.

[81] The following passages from the judgment of the Court of Appeal in D *Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor* [2011] 5 MLJ 219, delivered by Ramly Ali JCA (as he then was) which also concerned a consent order, merit reproduction:

> [23] It is trite that a consent order could give rise to a plea of res judicata. There are a number of authorities on this point. Among them are: *Palmer and another v* E *Durnford Ford (a firm) and another* [1992] 2 All ER 122; *Cohen v Jonesco* [1926] 1 KB 119; *In re South American and Mexican Company; Ex parte Bank of England* [1895] 1 Ch 37; and *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165.
>
> [24] The consent order in the present case is founded on a contract or agreement F between the parties based on both parties' willingness to submit to the discontinuance of the first suit on certain terms. Once the appellant and the respondents took the matter beyond contract and recorded a consent order then they must accept all the implications of a court judgment or order. In this sense the court now cannot vary the terms of the order. The application by the respondents G for striking out the second suit under O 18 r 19 was in effect to enforce the terms of the agreement or contract and the said consent order.
>
> [25] It must be noted that the appellant's letter dated 12 August 2003 to the respondents clearly proposed that the first suit be withdrawn 'without liberty to file afresh'. The respondents' reply to that letter, also affirmed that the said withdrawal H was 'without liberty to file afresh'. The consent order dated 25 August 2003 also made no mention that the first suit was withdrawn 'with liberty to file afresh'. On the above strength and understanding, the respondents also withdrew their counterclaim against the appellant. It was a clear representation that there would be closure of the matter. Thus the doctrine of estoppel as expounded in *Boustead* I *Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331 is applicable in the present case. The appellant ought to be estopped from filing the second suit against the respondents. In the circumstances, to allow the appellant to file a fresh action (the second suit) based on the same facts or substantially the same facts would be unjust and grossly prejudicial to the respondents particularly when the counterclaim against the appellant had been withdrawn by the respondents.

[82] The one other submission of the plaintiffs is that there is no consideration on the part of the defendant to the consent judgment, for there is no action needed to be performed by the defendant in this consent judgment means that there is a total failure of consideration to the consent order. There is in my view no merit in this contention. Forbearance by the defendant, in terms of not proceeding with the summary judgment application in the writ action and permitting an extension of time for the plaintiffs to settle the facility are a clear form of consideration, in consonant with the meaning of consideration found in s 2(d) of the Contracts Act 1950 which enacts that promises to do or to abstain from doing something is a consideration.

[83] On the whole, the case of the plaintiffs in the instant application is insufficiently cogent to mount an effective challenge to the defendant's strike out attempt. Furthermore, in the final analysis, considering the circumstances of the instant case, and the evidence made available before the court, it cannot be emphasised enough that in this case, a clear injustice would be occasioned to the defendant if its application is refused, even at this early stage, for defaulters such as the plaintiffs would instead be allowed to benefit from their own breach, and thus offends the notion of fairness and justice. In the instant case, the plaintiffs had benefitted from the disbursement of the term loan facility. They then benefitted again from the defendant's agreement, as embodied in the essence of the consent judgment the essential part being the non-pursuit of the writ action against the plaintiffs. Now, the plaintiffs seek to invalidate the very consent judgment itself. This the court cannot lend any further assistance to the plaintiffs.

[84] In *Bank Simpanan Nasional v Rudysham bin Abdul Raof* [2016] MLJU 909; [2017] 4 CLJ 234, I had stated thus:

> (h) No Benefit from Own Default
>
> [87] It is also my finding that the appellant is additionally subject to the trite principle of law that a party cannot benefit from his own wrong or default, which in this case, being the negligent mistake by the appellant. It is an established presumption in law that parties to a contract do not intend that either party should be able rely on its own breach of obligations to avoid a contract or obtain any benefit under it, unless the contrary is clearly provided for by the contract (see the House of Lords decision in *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1.

CONCLUSION

[85] In view of the foregoing reasons, it is my judgment that the defendant has more than clearly, on a balance of probabilities succeeded in establishing their case to have the originating summons to be struck out under any one of the grounds stipulated under O 18 r 19(1)(b) and (d) as under O 92 r 4 of the

RC 2012. The action by the plaintiffs is in other words frivolous and vexatious under O 18 r 19(1)(b) and otherwise an abuse of process under O 18 r 19(1)(d) and O 92 r 4. As such, I allow encl 4, and strike out the action of the plaintiffs, with costs.

Enclosure 4 allowed.

Reported by Afiq Mohamad Noor